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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 704

JOHN WALDON,
Petitioner and Appellant,

vs.

THE UNITED STATES OF AMERICA,
Respondent and Appellee.

PETITION FOR REHEARING OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

JOHN WALDON in *pro per*,
Box 620,
Alcatraz,
California.

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PETITION FOR REHEARING OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, The Supreme Court of The United States:

Your petitioner, John Waldon, respectfully moves the Court to grant a rehearing in the above-entitled cause, and he prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit entered in this cause on October 25, 1944 (R. 65, 66, 67), wherein the said Court consisting only of two Circuit Judges in a per curiam opinion granted leave to file a motion for resentence and thereupon denied said motion upon the merits.

Jurisdiction to Entertain Petition for Rehearing

The statement of jurisdiction in the brief in support of the petition for writ of certiorari is in question: The jurisdiction of the Court of Appeals for the Seventh Circuit is in question:

Should this petition for rehearing and certiorari be contrued as one of those instances not covered by section 240 (a) of the Judicial Code (28 U. S. C. Section 347a), then the jurisdiction of this Court is invoked under the general power conferred by Section 262 of the Judicial Code (28 U. S. C. Section 377). In the case of *In Re Church St. Corp.*, 299 U. S. 24, 57 S. Ct. 88, 89, this Court held as follows:

> "Although the Circuit Court of Appeals declined jurisdiction, its action may properly be reviewed upon a Writ of Certiorari under the general power conferred by Judicial Code, sec. 262, 28 U. S. C. sec. 377 (28 U. S. C. A. Sec. 377). That provision contemplates the employment of this writ in instances not covered by section 240 of the Judicial Code (28 U. S. C. Sec. 347) and affords ample authority for using the writs as an auxiliary process and as a means "of giving full force and effect to existing appellate authority and of furthering justice in other kindred ways." (and cases cited).

In the original application for certiorari, *Walden* v. *United States*, No. 704, decided present term February 26, 1945, the Solicitor General, Charles Fahy, in his memorandum for the respondent in opposition, has conceded that the Seventh Circuit Court of Appeals was without jurisdiction to entertain the petition in that Court inasmuch as such petition should have been adjudicated in the District Court of original jurisdiction, he said as follows:

> (page 4) "Argument. * * * In these circumstances it is settled that the Circuit Court of Appeals

> lacked power to entertain petitioner's application as a question for rehearing, for "the case had passed beyond the control of the Court" (citing cases). * * * Viewed in its other aspects as a petition for leave to proceed on motion in the sentencing court, we believe that the petition was unnecessary, for petitioner is entitled as of right to file a motion for resentence in the District Court." (cases cited)

Upon the record (R. 65) the Court of Appeals certified that: "Appeal from the District Court of the United States for the Eastern District of Illinois." The Court of Appeals, as in the instant case treated the petition as a motion to resentence and thereby adjudicated the same, denying the petition upon the merits. The Circuit Court of Appeals assumed jurisdiction over an action clearly beyond its control. The petitioner's application in the Court of Appeals was made in the twofold. On leave to file petition for rehearing or in the alternative, for leave to proceed on motion in the trial court. The petition before the Court of Appeals for rehearing, should have been denied for reasons stated at page 4 of the Solicitor General's memorandum in opposition; the leave to proceed in the District Court on the alternative should have been granted for reasons stated by the Solicitor General at page 4 of the memorandum in opposition. For the reason stated in the Solicitor General's memorandum the decision rendered by the Circuit Court of Appeals is a nullity and subject to review in Certiorari in this Court. Until such decision is reviewed and reversed it stands as an intermediate bar to proceed in the District Court. Assuming that petitioner had a right to file a motion in the District Court for correction of sentence and met the same fate as the motion in the Court of Appeals present decision in the District Court.

As further authority for entertaining this petition for rehearing, it can be said that, "It is a general rule of law

that all judgments, decrees, or other orders of the Courts, however conclusive in their character, are under control of the Court which pronounces them, during the term at which they are rendered or entered of record, and they may be set aside, vacated, modified or anulled by that Court." *Bronson* v. *Schulter,* 104 U. S. 410, 26 L. Ed. 797; *Phillips* v. *Negley,* 117 U. S. 665.

In Ex parte Lockhart, No. 13, original decided February 10, 1941, the then Solicitor General, Francis Biddle, in his memorandum for the respondent in opposition, recognized the general power conferred upon the Court by said Section 377, as follows:

> (Page 2): Jurisdiction. * * * Although the motion invokes the jurisdiction of this Court under Section 240 (a) of the Judicial Code as amended by the act of February 13, 1925, jurisdiction must be invoked under Section 262 of the Judicial Code (U. S. C. Title 28, Sec. 377. See In Re Church St. Corp., 299 U. S. 24."

Grounds for This Petition

The grounds, Questions Presented, Reasons for Granting The Writ and Argument, as well as all other matter presented in the first petition for writ of certiorari, and briefs in support thereof, are adopted by reference and made a part of this petition, save; that the jurisdictional statement and the jurisdiction as alleged therein be and the same ruled null and void and stricken from said petition and brief and that the jurisdiction of this Court is invoked under 28 U. S. C. Section 377 (of the Judicial Code Section 262) 28 U. S. C. A. Section 377, for reasons above stated and for other reasons as quoted in: In Re Church St. Corp., 299 U. S. 24, 57 S. Ct. 88, 89.

In addition thereto, petitioner specifically designates the following facts and arguments as grounds for this petition:

On October 25, 1944 the United States Circuit Court of

Appeals for the Seventh Circuit rendered their decision in this case which appears at pages (R. 65, 66, 67), which petitioner now seeks to have reviewed. The Court of Appeals for the Severth Circuit was without jurisdiction to entertain the motion for resentence and this Court may order the same vacated and set aside for reasons stated in this petition, and the petition of the Solicitor General for the respondent.

Since the Court of Appeals was without jurisdiction to entertain the motion in their Court, it was likewise deprived of the power to adjudicate the same upon the merits. However petitioner contends that the merits in this case are plain and warrant the attention of this Court inasmuch as the Courts below have decided adversely to numerous precedents which rule the case at bar.

On September 6, 1939, petitioner and two others were indicted in the District Court of the United States for the Eastern District of Illinois on an indictment in seven counts, charging violation of the postal laws as defined under the Statutes, to-wit: See the Solicitor General's Memorandum in opposition in this case at pages one and two.

Petitioner was convicted on all seven counts of the indictment and sentenced as follows, to-wit: Five (5) years each on Counts 1, 2, 3, 4, and five to be served consecutively, for a violation of 18 U. S. C. (Criminal Code Section 194) 18 U. S. C. A. Section 317. And for a term of 25 years to be served on each of counts 6 and 7 to be served consecutively with each other, but concurrently with the sentences imposed on the first five counts, or a total of 50 years (R. 27-28), the two later sentences on counts 6 and 7 for terms of 25 years were imposed for a violation of 18 U. S. C. (Criminal Code Section 197) 18 U. S. C. A. Section 320. Also a fine of ten thousand dollars was ad-

judged under each twenty-five (25) year sentence for a violation of 18 U. S. C. A. Section 320.

18 U. S. C. (Cr. Code Sec. 197) 18 U. S. C. A. Section 320, provides:

> "Whoever shall assault any person having lawful charge, control or custody of any mail or of any money or other property of the United States, with intent to rob, steal or purloin such mail matter or other property of the United States or any part thereof, or shall rob any such person of such mail matter or of any money, or other property of the United States, or any part thereof, shall for the first offense be imprisoned not more than ten years; and if in effecting or attempting to effect such robbery, he shall wound the person having custody of such mail, money, or other property of the United States or put his life in jeopardy by the use of a dangerous weapon or for a subsequent offense, shall be imprisoned 25 years."

It is obvious from the above quoted Statute that twenty-five years is the maximum penalty for a single mail robbery and that the Statute provides for that sentence above and no fine. However the Trial Court imposed two twenty-five year sentences to run consecutively a total sentence of 50 years and a fine of twenty (20) dollars. 18 U. S. C. A. Section 320, makes no provision for any fine whatsoever. However the Trial Court in this case by virtue of a writ of execution ordered sold personal property of the petitioner, the amount recovered to apply on the twenty-thousand fine. To this date, $833.50 has been paid to the Clerk of the United States District Court and retained by him or coverted into the Treasury of the United States. The Trial Court upon receiving a copy of petitioner's petition to the Circuit Court of Appeals vacated the fines on its own motion. But in the instant case petitioner has been deprived of his property by the Trial Court without due

process of law. The sentences and fines were imposed by the District Judge.

In *United States* v. *Trierweiler et al.*, 52 F. Supp. 4, the District Judge in the instant case, Judge Walter C. Lindley wrote the opinion in which he said:

> "The Congressional purpose, obviously, is to assure enjoyment of the rights of Citizens defined by the Constitution, including the mandate that, no group of persons, shall deprive any person of life, liberty, or property without due process of law."

The sentence of fifty (50) years is in excess of the maximum provided for by the Statute. Counts 6 and 7 will only support a sentence for twenty-five (25) years, notwithstanding the number of counts. *Colson v. Johnston*, 35 F. Supp. 317; *Costner* v. *U. S.*, 139 F. 2d 429; *Dimenza* v. *Johnston*, 130 F. 2d 465.

Petitioner adheres to his brief in support of his petition for a writ of Certiorari as though the same was fully set forth at length herein.

WHEREFORE, petitioner respectfully prays that this petition be granted.

Respectfully submitted,

JOHN WALDON *in pro per.*

Dated March 17, 1945.